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# IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PLANNING RESEARCH CORPORATION,
*Petitioner*,

v.

UNITED STATES OF AMERICA
*ex rel.* MERVYN A. SCHWEDT,
*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR NATIONAL SECURITY INDUSTRIAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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# MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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The National Security Industrial Association (NSIA) respectfully moves for leave to file the attached brief as amicus curiae in support of petitioner in this case. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has declined to consent.

NSIA is a national organization of more than 300 manufacturing, research, and service companies from all segments of industry that provide goods and services in support of the national security needs of the United States.

The members of NSIA often enter into contracts to provide goods and services to government agencies.

The question in this case concerns the scope of the civil liability provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733 -- specifically, the circumstances under which a person may be liable for damages or penalties for making a false claim for payment by the government, 31 U.S.C. § 3729(a). In the course of performing their government contracts, NSIA's members must have frequent communication with government agencies and officials. The decision below effectively expands the scope of the Act to reach not only claims for payment but also many other communications that are not calculated to induce the government to part with money. That expansion threatens to increase significantly the burden that NSIA's members already suffer from unmeritorious lawsuits brought by *qui tam* relators who can act without government acquiescence. Accordingly, NSIA has a strong interest in having the erroneous decision below corrected, and we believe the Court would benefit from its views in this case.

Respectfully submitted,

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# BRIEF FOR NATIONAL SECURITY INDUSTRIAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF THE AMICUS CURIAE

The National Security Industrial Association (NSIA) is a national organization of more than 300 manufacturing, research, and service companies from all segments of industry that provide goods and services in support of the national security needs of the United States. NSIA members annually

perform billions of dollars of work for government agencies pursuant to thousands of contracts.

Because much of their work involves government contracts, NSIA members are exposed to the possibility of suits initiated by private individuals pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733. Many of NSIA's members have already been defendants in such suits, which are frequently meritless. Even when the lawsuit has no merit, however, *qui tam* litigation is often extremely burdensome. Because the court of appeals' erroneous decision in this case greatly expands the circumstances that might allow an individual to draft a facially valid complaint initiating a *qui tam* action, the members of NSIA have a strong interest in the Court reviewing this case and confining *qui tam* actions within the limits established by Congress.

## SUMMARY OF ARGUMENT

The decision below, by means of a creative and unacceptably broad definition of the term "claim," has expanded the reach of the civil liability provisions of the False Claims Act far beyond the limitations established by Congress. The text of the statute and the decisions of this Court clearly establish that civil liability under the Act attaches only to false statements associated with an immediate demand for payment by the government. Although the decision below pays lip service to that limitation, it effectively sidesteps it by holding that the requirement of a "claim" for payment here was satisfied by the mere fact that the defendant had the ultimate "goal of receiving payment" for its product. Pet. App. 7a.

Almost every government contractor has the ultimate goal of receiving payment for its performance. These contractors also are likely to have numerous communications with the government concerning their obligations under the contract. Thus, the court of appeals' decision greatly expands the scope of the False Claims Act by sweeping within the purview of its civil penalties a multitude of false statements that have nothing to do with demands for payment.

The effect of that erroneous expansion of the Act's coverage is magnified by two other factors: (1) the minimal threshold for "falsity" exemplified by the decision below, where the alleged misrepresentation was little more than a difference of opinion over whether the product complied with specifications (see Pet. App. 7a); and (2) the recognized tendency of many *qui tam* plaintiffs to initiate and pursue False Claims Act suits that the government regards as unmeritorious. Unless this Court acts to correct the lower court's misinterpretation of the Act, the courts can expect to experience an explosion of unwarranted *qui tam* lawsuits that will unnecessarily burden both the judiciary and unjustly accused defendants.

## ARGUMENT

### A. The Filing of a False Claim is a Prerequisite to Civil Liability Under the False Claims Act

The text of the False Claims Act, 31 U.S.C. §§ 3729-3733, is unambiguous in describing the circumstances that can give rise to civil liability. A person who knowingly presents to a government employee "a false or fraudulent *claim for payment* or approval" or who knowingly makes "a

false record or statement *to get a false or fraudulent claim paid* or approved by the Government" is liable for a civil penalty of up to $10,000. 31 U.S.C. § 3729(a)(1), (2) (emphasis added). The key requirement of a "claim" is specifically defined as "any request or demand . . . for money or property . . . if the United States Government provides any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

This definition reflects earlier decisions by this Court that made clear that civil False Claims Act liability does not attach without the filing of a false claim for payment. The leading case is *United States v. McNinch*, 356 U.S. 595 (1958), where the government sought to bring a False Claims Act suit against a defendant who allegedly had made false statements in an application to a bank for a loan that would be guaranteed by the Federal Housing Administration (FHA). This Court did not dispute that the alleged misconduct was reasonably viewed as a "kind of fraud practiced on the Government" (*id.* at 599) and that the fraudulent loan application could reasonably "be regarded as a claim, in that the applicant asserts a right or privilege to draw upon the government's credit" (*id.* at 598). Citing to the history and purposes of the False Claims Act, however, the Court ruled that the loan application was not the kind of "claim" that fell "within the scope that Congress intended the Act to have." *Id.* at 599.

Rather, the Court explained, Congress intended that the Act impose civil liability only when the "claim" is a kind of "demand for money." *Id.* at 599, quoting *United States v. Tieger*, 234 F.2d 589, 591 (3d Cir.), *cert. denied*, 352 U.S. 941 (1956). Even though the false loan application set in

motion events that eventually could have led to the government paying money in the event of default, the application was not a "claim" within the meaning of the Act because it did not request that the FHA disburse funds or otherwise cause the FHA any "immediate financial detriment." 356 U.S. at 599.

The Court revisited this issue several years later in *United States v. Neifert-White*, 390 U.S. 228 (1968), where it reinforced the importance of whether the defendant has made a demand for payment. This time the Court found that there was False Claims Act liability for the defendant's false statements made in a loan application submitted to a federal agency. The Court explained that the crucial difference between that case and *McNinch* was that the loan request made directly to a federal agency triggered a disbursement of government funds and therefore was a form of a demand for payment by the government. Because *Neifert-White* "involve[d] a false statement made with the purpose and effect of inducing the Government immediately to part with money," it fit the definition of a "claim" that gives rise to civil liability under the Act. 390 U.S. at 232.

### B. The Court of Appeals' Approach Eviscerates the Critical Requirement of the Filing of a False Claim and Conflicts with Decisions in Other Circuits by Allowing Civil Liability to Attach to False Statements Made to the Government that Have No Relation to a Demand for Payment

1. It is undisputed that the defendant in this case never demanded payment from the government for software that did not meet contract specifications. It submitted three

progress reports that allegedly falsely described the status of the project, and on four occasions it delivered software for testing. When the government rejected the software after testing as not meeting specifications, the defendant did not submit invoices or otherwise seek payment for the rejected software. *See* Pet. App. 3a-4a.

The court of appeals purported to recognize the fundamental rule that civil liability attaches only to the presentation of a false claim for payment. *Id.* at 6a. Noting that a "submission need not be an actual invoice to be a 'claim' or 'statement' under the Act," however, the court then proceeded to define "claim" so broadly as to eviscerate that fundamental rule. *Id.* The court stated that if the progress reports had falsely stated that the software was complete when in fact it did not yet meet specifications, then "these progress reports would constitute false statements in support of false claims and would trigger the Act's civil penalty." *Id.* The court acknowledged that the progress reports were not invoices seeking payment and that the defendant "did not submit a bill for the software." *Id.* at 7a. The failure to demand payment was immaterial, according to the court, because the defendant's "goal of receiving payment was implicit in the submission of the goods, and the accompanying progress reports had the purpose of 'get[ting] . . . [the] claim . . . approved.'" *Id.*, quoting 31 U.S.C. § 3729(a)(2).

Though obscured somewhat by its terseness, the effect of the court's reasoning undeniably is to allow false statements that are not associated with a demand for payment to give rise to civil liability under the Act. The court found that the complaint "state[d] a claim based on the three progress

reports," although those progress reports at most contained false statements but concededly did not seek payment. Pet. App. 7a. The court addressed the requirement of a "claim" for payment with its statement that the defendant ultimately had the "goal of receiving payment" for the submission of its goods. *Id.* But if that observation is sufficient to satisfy the requirement, then there is effectively no requirement at all. Virtually everyone who enters into a contract to provide goods or services to the government does so with the ultimate "goal of receiving payment."

Thus, the effect of the court's decision is to destroy the crucial distinction between a mere false statement and a false claim that is designed to induce the government to part with money immediately. That distinction is not only one recognized by the courts but also one that Congress has emphasized as significant. In considering the Program Fraud Act of 1986, 31 U.S.C. §§ 3801-3812, which was designed to extend liability like that under the False Claims Act to smaller claims, Congress noted that "under present law, there is no civil penalty for submitting a false statement, unrelated to a claim, to the government." S. Rep. No. 212, 99th Cong., 1st Sess. 18 (1985). Thus, in discussing the proposal that the Program Fraud Act contain a separate section that would establish liability for "[p]ersons knowingly submitting false statements, unrelated to a claim," the Senate Report acknowledged that the new statute would go beyond the limitations contained in the False Claims Act. *Id.* at 17.

Indeed, elsewhere in its opinion the court effectively acknowledges that its decision obliterates the key distinction between false statements and false claims for payment. Several cases have made clear that the Act allows for the

imposition of a distinct penalty for each false *claim* submitted, but not for each false *statement* submitted. *See, e.g., Miller v. United States*, 550 F.2d 17, 24 (Ct. Cl. 1977); *United States v. Woodbury*, 359 F.2d 370, 377-78 (9th Cir. 1966), *United States v. Grannis*, 172 F.2d 507, 515-16 (4th Cir.), *cert. denied*, 337 U.S. 918 (1949). In *United States v. Bornstein*, 423 U.S. 303 (1976), this Court expressed its approval of this line of cases, noting that they were "in accord with this Court's statement that 'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.'" *Id.* at 309 n.4, quoting *United States v. McNinch*, 356 U.S. at 599.

This rule would appear to pose a practical problem for calculating potential penalties in this case because the "claim" relied upon by the court of appeals -- the ultimate goal of receiving payment -- is too inchoate to count as an event that triggers an individual penalty assessment. The court of appeals dealt with this problem by simply ignoring the distinction between false claims and false statements, observing that "[e]ach individual false claim or statement triggers the statute's civil penalty." Pet. App. 6a, citing *Bornstein*, 423 U.S. at 313. That incorrect assertion allowed the court of appeals to agree with the plaintiff that each of the three progress reports gives rise to a separate penalty, even though the progress reports are not claims for payment but at most are false statements. *See* Pet. App. 8a. In so doing, the court of appeals subtly expanded the reach of the Act in a manner that has tremendous significance for False Claims Act litigation.

2. The decision of the court below is irreconcilable with decisions in other circuits. Other courts of appeals have

routinely and uniformly rejected False Claims Act liability for false statements not associated with a false claim, even though the defendant had the ultimate goal of inducing the government to pay out money.

*Brunswick Bank & Trust Co. v. United States*, 707 F.2d 1355 (Fed. Cir. 1983), is illustrative. In that case, a bank issued a construction loan and then misrepresented to a federal agency that all construction and acquisition had been completed on the project, which was a certification needed before the agency would enter into a contract to guarantee the loan. *Id.* at 1364 & n.12. The court ruled that this misrepresentation was not an actionable false "claim" under the Act because it did not "in any way affect[] the bank's contractual and legal right to reimbursement under the contract of guaranty." *Id.* at 1365. The court emphasized that "[i]n order to determine whether a false claim for payment has been presented upon the United States, a court must focus on the actual claim for reimbursement under the guaranty contract." *Id.* at 1365 n.13. Plainly, this approach would not allow for imposition of False Claims Act liability in circumstances like those presented here. *See also United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) ("the statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'"); *United States v. Ekelman & Assoc., Inc.*, 532 F.2d 545, 552 (6th Cir. 1976) (statute of limitations does not begin to run until the defendant "presents a claim to the VA or FHA for payment on the guaranty or insurance").

### C. The Court of Appeals' Error Has a Broad and Deleterious Impact on False Claims Act Litigation that Warrants the Attention of This Court

The potential mischief wrought by the court of appeals' decision is enormous. A contractor can be expected to have countless communications with government officials in the course of performing its obligations under the typical government contract. According to the decision below, each one of these communications has the potential for triggering a False Claims Act suit, even if it is unrelated to a claim for payment. Indeed, even if the contractor *never* makes any claim for payment, it can be exposed to False Claims Act liability so long as the goal of its efforts at performance was to obtain payment for goods or services.

Moreover, this case demonstrates how flimsy the allegations of falsity can be and still be regarded by a court as sufficient to support a cause of action under the Act. The defendant submitted a series of progress reports containing a table reflecting how close it was to completion of various tasks. The progress reports listed certain software development as 100 percent completed when the software was ready for submission to the government. The court of appeals ruled that, when the product failed government testing, the plaintiff was entitled to file suit on the ground that the defendant "'present[ed] and cause[d] to be presented non-functional and non-compliant software to representatives of the United States while wrongfully and knowingly misrepresenting that said software was compliant and functional.'" Pet. App. 6a, quoting Complaint ¶ 25.

To the court, it was not material that the defendant responded to the government's failure to accept the software in the way that most customers would want their supplier to respond; the defendant went back to work on improving the software and *did not attempt to seek payment* for the rejected product. In other words, under the decision below a contractor may expose itself to False Claims Act liability whenever it has a difference of opinion with the government over the quality of its product -- even if the contractor accedes to the government's opinion and determines not to seek payment for a product that has been rejected as unsatisfactory.

This decision thus opens the door to a tremendous expansion of False Claims Act litigation beyond the limits established by Congress. Because of the *qui tam* provisions of the Act, there is no reason to hope that prosecutorial discretion will prevent this potential expansion from becoming a reality. Experience under the Act shows that its *qui tam* provisions lead to private lawsuits in many instances where there has not truly been an attempt to defraud the government and where the government itself would not regard the circumstances as appropriate for seeking civil liability. Even under the Act as properly construed, the Justice Department has complained to Congress about the abuse of the *qui tam* provisions by private citizens who are more interested in fortune hunting than in penalizing actual efforts to defraud the government. The Assistant Attorney General of the Civil Division testified in 1992 that many *qui tam* suits are "frivolous," presenting "no evidence, no information based on personal knowledge, or are 'kitchen sink' complaints containing every conceivable broad allegation without any specific evidence whatsoever." *False*

*Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee of the Judiciary*, 102d Cong., 1st Sess. 24 (1992) (Statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Dept. of Justice).

The government declines to appear in most of the *qui tam* cases that it investigates (*id.* at 25), including this one, but that government judgment that the case is unmeritorious does not prevent the suit from proceeding. The result is much litigation that, even though the suit ultimately will be dismissed, is unnecessarily burdensome to the judicial system and the defendants who are unjustly accused. The court of appeals' expansive and erroneous redefinition of the circumstances that can give rise to civil liability under the Act will further exacerbate this problem by allowing a potential *qui tam* plaintiff to cobble together a facially valid complaint in connection with almost any government contract, regardless of whether the contractor has attempted to obtain payment from the government by fraud.

Finally, even for those cases where a contractor is legitimately subject to liability under the Act because it has submitted a false claim for payment, the decision of the court of appeals establishes a rule that destroys the fabric of the Act's penalty provisions. In determining the penalty that attaches to a False Claims Act violation, Congress was aware that each separate false claim would be actionable as a separate violation. It did not contemplate, however, that each individual communication between the contractor and the government, such as a progress table routinely included in periodic progress reports, could give rise to a separate

penalty. An approach that treats every single false statement as a separate violation may transform even relatively minor cases, where little or no actual damage occurs, into ones involving hundreds of thousands or millions of dollars in potential penalties.

For all of these reasons, this Court should not let the decision below stand. Rather, it should grant certiorari and reverse the court of appeals in order to restore uniform application of the False Claims Act's rule that civil liability does not attach to false statements alone, but rather only when a false claim for immediate payment is filed.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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